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2 UNITED STATES DISTRICT COURT  
3 SOUTHERN DISTRICT OF NEW YORK  
4 -----x

5 LATRICE DARLENE SHEPHERD,

6 Plaintiff,

7 v.

8 11 CV 7634 (RJS)

9 BCBG MAX AZRIA,

10 Defendant.  
11 -----x

12 New York, N.Y.  
13 June 4, 2012  
14 3:00 p.m.

15 Before:

16 HON. ANDREW J. PECK,

17 District Judge

18 APPEARANCES

19 LATRICE DARLENE SHEPERD  
20 Plaintiff pro se for Plaintiff

21 LITTLER MENDELSON  
22 Attorneys for Defendant  
23 ERIC A. SAVAGE, ESQ.

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1 (Case called)

2 (In open court)

3 THE COURT: Let's see where we are in this case from  
4 the parties' points of view. Let's start with the defendants.

5 MR. SAVAGE: Good afternoon, your Honor. Eric Savage  
6 of Littler Mendelson and my colleague Morgan Matson.

7 There are a few open items we'd like to raise to the  
8 Court today, in no particular order we have as follows. I  
9 guess I'll start with the most important item. We have, and  
10 Ms. Sheperd has already seen an amended answer and counterclaim  
11 that we would like to file and serve. The reason is this.

12 We took Ms. Sheperd's deposition last Thursday, the  
13 30th of May. During that deposition Ms. Sheperd testified that  
14 in early 2009 she had a conversation with the company's human  
15 resources manager, a woman named Carla Macias, about various  
16 aspects of her, meaning plaintiff's, complaints about what was  
17 going on in the store where she was working. California --  
18 Ms. Mecias lives and works in California and when the  
19 conversation took place Ms. Sheperd was here in New York,  
20 Ms. Mecias was in California. California is a two party  
21 consent state. It refers to both parties in a conversation by  
22 telephone to consent to the taping of their conversation.  
23 During deposition Ms. Sheperd testified that she taped the  
24 telephone call and was quite emphatic that she did not advise  
25 Ms. Mecias that she was in fact taping it. That is illegal and

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1 in fact subjects Ms. Sheperd to fine, if not actual criminal  
2 liability under California law.

3 So on Friday we sent to Ms. Sheperd a proposed amended  
4 answer and counterclaim identifying those issues, which of  
5 course we had no way of knowing until we took her deposition,  
6 and seeking to, asking her whether she would consent to our  
7 filing that, to which she has objected.

8 In addition, we learned during that --

9 THE COURT: Let me interrupt one minute there. It may  
10 be a criminal matter in California. Is there a private right  
11 of action under the California statute?

12 MR. SAVAGE: Yes, there is, and as we pled the statute  
13 in the answer and counterclaim, it does provide for not a huge  
14 amount but for some amount of monetary relief to the offended  
15 party, which is us.

16 THE COURT: Well, is the offended party you or is it  
17 Ms. Macias?

18 MR. SAVAGE: Well, it's actually to Ms. Macias in her  
19 capacity as a representative of the company because she was  
20 being called in her capacity as a human resource director of  
21 BCBG. What we learned in addition to that is that we believe  
22 sometime in 2010 after Ms. Sheperd had already gone to the EEOC  
23 and at some point she may or may not have been discussing the  
24 matter with counsel, that recording was destroyed. It was on,  
25 Ms. Sheperd testified that it was recorded on her BlackBerry,

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1 at some point she switched from a BlackBerry to an iPhone and  
2 the conversation was lost. She testified that there is now no  
3 way of retrieving it. We obviously want to assert that as an  
4 affirmative defense and just no state secrets here, when we  
5 submit the letter on or before July 18 on a summary judgment  
6 motion we're also going to be seeking a motion for spoliation  
7 sanctions.

8 The other thing we want to assert in the answer which,  
9 again, we had no way of knowing until the afternoon of the 30th  
10 when this information came out during the deposition is an  
11 after acquired evidence defense, to the effect that had the  
12 company known of the undisclosed taping by Ms. Sheperd of her  
13 conversation with Ms. Mecias in her capacity as an employee of  
14 the company, the human resources director of the company, would  
15 have been justified in terminating her at that moment.

16 So that's issue number one. Issue number --

17 THE COURT: Before you get to issue number two, let me  
18 hear from Ms. Sheperd as to her position on the amendment, not  
19 whether it's all true or anything else, but why the amendment  
20 should or should not be allowed at this time.

21 MR. SAVAGE: I have a copy for your Honor if the Court  
22 wants to see it.

23 THE COURT: Hand it up, yes. Ms. Sheperd?

24 MS. SHEPERD: Your Honor, the reason that, I did speak  
25 with human resources. I don't particularly remember if it was

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1       in the early part of 2009, I don't remember at this point.  
2       However, I did speak with the human resources manager with  
3       regards to my concern for discrimination as an employee for  
4       BCBG. I felt that it was necessary to tape our conversation.  
5       I didn't know that I was doing something against the law. I  
6       just needed -- I felt that I needed something to refer back to  
7       in case I ended up in court. I'm a resident of New York. How  
8       can -- I don't necessarily understand how I could be liable or  
9       responsible for --

10           THE COURT: I'm not sure that it doesn't violate the  
11       telephone company tariffs in New York either, but the question  
12       is this, not what is your defense to this, but is there any  
13       reason this shouldn't become part of the case and then if  
14       you're right that you had no reason to know or that this  
15       statute does not create a private right of action or that if it  
16       does it's for Ms. Mecias personally and not for BCBG or  
17       whatever else it may be, the question is why should the Court  
18       not allow it so that the entire case, whatever issues there  
19       are, are not in front of the trier of fact at the appropriate  
20       time?

21           MS. SHEPERD: The Court shouldn't allow it because it  
22       has nothing to do with the issue at hand, the issue that I  
23       incurred when I was working in the company.

24           THE COURT: But anything to do with your working at  
25       the company is part of the whole package here. If that's the

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1 only basis for the objection, that and you didn't know it would  
2 violate California law, then I'm going to be inclined to allow  
3 the answer and counterclaim.

4 MS. SHEPERD: However, your Honor, you didn't allow me  
5 to submit an amended complaint.

6 THE COURT: It was because it didn't state a claim.  
7 The question is you were, as I recall, trying to assert a class  
8 action and various other things that were not appropriate as a  
9 matter of law. All right? Any other reasons with respect to  
10 this?

11 MS. SHEPERD: No.

12 THE COURT: All right. Permission is granted to file  
13 the amended answer and counterclaim.

14 MR. SAVAGE: Thank you. We'll have this filed on the  
15 records of the Court by tomorrow, if not earlier than that.

16 THE COURT: All right, what else?

17 MR. SAVAGE: Issue number two. After the deposition  
18 was concluded on Thursday we put together a list of items that  
19 we wanted Ms. Sheperd to produce to us, items she identified or  
20 discussed during the deposition. We submitted that to her by  
21 Federal Express, certified mail and e-mail by letter dated  
22 May 31. I have a copy for the Court, and since we are bumping  
23 up against a June 14 discovery cutoff I would like an order  
24 that these materials be produced to us by no longer than  
25 Monday, June 11.

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1                   THE COURT: Were they requested prior to the  
2 deposition?

3                   MR. SAVAGE: Some of them absolutely were requested  
4 prior to the deposition and we have a copy of, I think the  
5 Court's already seen at least in part the document requests and  
6 after the document requests were responded to by letter dated  
7 May 18 of which we also have a copy, we identified certain  
8 things which were missing, but everything that is in the May 31  
9 letter was either requested before the deposition or it came up  
10 as a result of testimony during the deposition of which we had  
11 no idea beforehand. And I have a copy for the Court if the  
12 Court wants to see this.

13                  THE COURT: You can hand it up. I'll defer discussion  
14 of that. What else?

15                  MR. SAVAGE: Issue number 3, your Honor. During the  
16 deposition Ms. Sheperd identified for us by general description  
17 only the fact that she had seen some form of psychologist or  
18 psychiatrist. All that she could remember at that point, and I  
19 have no reason to doubt her, was that his office was on the  
20 upper east side somewhere, which this being Manhattan doesn't  
21 eliminate a lot of people.

22                  We asked her to sign authorization of the disclosure  
23 of those records which we would use once we got the name and  
24 that's part of what's included in the letter of May 31. She  
25 did not want to sign them at that point. I represented to her

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1 on the record as an officer of the Court, that we had no  
2 interest in using any authorization that she signed for any  
3 purpose other than the particular psychologist or psychiatrist.  
4 I told her we would bring them, bring the authorizations to  
5 Court today for execution. I'd like to have them executed.  
6 There are actually three of them.

7 THE COURT: Let's figure out, do you know the name and  
8 address of the doctor or have any records?

9 MS. SHEPERD: I do have -- I'm sure I have records  
10 somewhere, your Honor. I don't necessarily remember the name.  
11 It was a woman on the upper east side. I was referred to that  
12 psychologist or psychiatrist, I can't remember, by New York  
13 Presbyterian. So I'll have to contact New York Presbyterian to  
14 speak with the person who saw me there to get the information.

15 THE COURT: That's going to take forever. Is there a  
16 claim for emotional distress damages in this case?

17 MS. SHEPERD: Yes.

18 MR. SAVAGE: And in fact, your Honor, number 9 on that  
19 letter of May 31 letter that I just handed up to the Court does  
20 request the name and address of the mental health specialist  
21 that you saw from June 2009 until December 2009 and whom you  
22 testified was located on the upper east side. This is also to  
23 remind you that once the name and address have been provided,  
24 you have agreed to sign an authorization for the release of  
25 protected health information.

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1           We asked during the deposition whether Ms. Sheperd had  
2 in her home any insurance forms, checks, canceled checks or  
3 other records and asked her to check those to determine whether  
4 the name of this person could be found. Obviously, if  
5 Ms. Sheperd is going to be pressing an emotional distress,  
6 mental, emotional and mental distress claim, we certainly need  
7 to find out who that is and get a copy of what I gather is her  
8 records.

9           THE COURT: Okay. Well, let me back up one minute,  
10 then. Ms. Sheperd, did you do your 26A mandatory disclosure on  
11 or about May 15th? And I see Mr. Savage shaking his head yes.

12           MR. SAVAGE: Yes.

13           THE COURT: And I take it you did not list the name of  
14 any psychiatrist or psychologist or the like in that?

15           MS. SHEPERD: I didn't list the additional. I listed  
16 the one -- I saw one for three months at New York Presbyterian.  
17 Apparently when you're checked in there you're seen by someone  
18 for three or four months, then they refer you outside. So I  
19 forgot about the woman I did see outside. I was terminated  
20 shortly thereafter, so I didn't have insurance, I never saw her  
21 again.

22           MR. SAVAGE: Your Honor, I can represent that in the  
23 26A disclosure in which Ms. Sheperd absolutely did provide,  
24 there's no medical provider of any sort identified, either by  
25 name, phone number or anything else. There's nobody. There's

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1 a series of alleged witnesses ---

2 THE COURT: Do either of you have a copy of the 26A  
3 here?

4 MR. SAVAGE: I don't believe we do. There were six  
5 people listed. One was a former human resources person from  
6 BCBG. There were four other employees, one other person whose  
7 name I forget. None of them was a doctor, I'll tell you that.

8 THE COURT: But they could be a psychologist or social  
9 worker who is not an M.D. or PhD.

10 MR. SAVAGE: We went over the Rule 26. In the  
11 deposition I asked Ms. Sheperd who each of these people were.  
12 None of them were treating physicians, psychologists,  
13 psychiatrists, social workers, anything like that.

14 THE COURT: Ms. Sheperd, you said you did put  
15 someone's name down, he said you didn't. Neither of you have  
16 the paperwork here, which makes it impossible for me to do  
17 anything. If you did not list any treating  
18 medical/psychological, then my inclination would be to say we  
19 just convert this back to a plain vanilla claim, which is to  
20 say you're not allowed to say you saw doctors. You say, you  
21 know, I was distressed because I was treated unfairly, fired,  
22 whatever, and the jury awards you whatever they can award you  
23 under that up to the maximum allowed under New York law.

24 MS. SHEPERD: Okay. Your Honor, maybe I didn't put it  
25 on 26A, but what I provided for them in their interrogatories

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were where I was seen, who I was seen by, the social worker that I saw for three months while on disability. The only person that I did not tell them was who I was referred to once I was discharged from New York Presbyterian. I signed a release for New York Presbyterian. I also signed a release for the general practitioner doctor. The only person they don't have is who I was referred to once I was no longer able to see the social worker at New York Presbyterian, which was after, once they discharged me from, once I was off of disability and returned to work I had to see someone else. That's the only person who they don't have record of. And I refused to sign the release because there was no name on there.

THE COURT: That's not the issue.

MR. SAVAGE: You know, your Honor, again, my bad, we did not bring the interrogatory answer. There was no doctor listed. In fact --

THE COURT: Okay. Stop, stop. Did you get a release for New York Presbyterian? Yes or no.

MR. SAVAGE: Yes, we did get a release from New York Presbyterian.

THE COURT: And you knew that was a psychological provider or no?

MR. SAVAGE: We knew it was a hospital. We knew Ms. Sheperd received some type of care. I don't think it's entirely clear what she had.

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1                   THE COURT: It's very hard for me to rule on this when  
2 you don't give me the documents and you and Ms. Sheperd have  
3 totally different views of what was in the documents. So at  
4 this point do whatever you need to do to find out the name of  
5 this person and provide that information and a completed  
6 release as promptly as possible to Mr. Savage and we'll go from  
7 there.

8                   MR. SAVAGE: I have the releases here for Ms. Sheperd  
9 to sign.

10                  THE COURT: But she's not going to sign them in blank  
11 and I'm not going to order her to. Because it's useless unless  
12 she figures out and figures out promptly the name of the doctor  
13 and if you want to make an application in writing that attaches  
14 the 26A, the interrogatories, everything you've got from her  
15 that might reveal whether you have prior to the deposition had  
16 any reason to know she was getting any psychological treatment,  
17 if the answer is no, I will preclude it. If the answer is yes,  
18 she did tell you, however inadvertently, then I will not preclude  
19 it and hopefully you'll get this information about the other  
20 treating psychologist.

21                  MR. SAVAGE: With respect to that, your Honor, and I  
22 recognize the Court's point of view, the only concern is this.  
23 We have a June 14 discovery cutoff, and we're all here today.  
24 If Ms. Sheperd gets ahold of me Wednesday, Thursday, Friday  
25 this week --

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1                   THE COURT: The short answer is, you know, had you had  
2 the information even at the deposition on May 30, the odds of  
3 you getting that documentation from a doctor without hitting  
4 the doctor over the head with a two-by-four, usually in the  
5 form of a Court order, is slim to none.

6                   MR. SAVAGE: Agreed, but at least if I have the signed  
7 materials here that once Ms. Sheperd gives me the name we can  
8 get them to the doctor promptly rather than my having to send  
9 them by Federal Express to Ms. Sheperd --

10                  THE COURT: Then give her all the blank releases and  
11 when she gets the name of the doctor she'll fill it out and  
12 send it back to you.

13                  MR. SAVAGE: I will do that. Just so we're clear,  
14 there are actually three forms. One is entitled authorization  
15 for release of protected health information, it's a one-page  
16 document. The second one, we need the first two both signed,  
17 is entitled authorization for release of health information  
18 pursuant to HIPAA and it has the New York State seal in the  
19 upper left-hand corner. The third one is a New York  
20 Presbyterian release and Ms. Sheperd has already signed one,  
21 but in case this psychiatrist happens to be affiliated with New  
22 York Presbyterian, belt and suspenders I would rather have this  
23 signed so I don't need to worry about getting a third one  
24 signed afterwards. So I'm going to hand this over to  
25 Ms. Sheperd now.

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1                   THE COURT: Good.

2                   MR. SAVAGE: The only other question I have, your  
3 Honor, is there is a June 18 deadline for us to submit a letter  
4 as to summary judgment. Now, this may sound like a silly  
5 question, but I don't know two things. One, does that letter  
6 go to your Honor, does it go to Judge Sullivan, does it go to  
7 both?

8                   THE COURT: It goes to me since for better or worse  
9 I've got the motion.

10                  MR. SAVAGE: Then the second issue is on that letter  
11 do we need to say anything other than we plan to file a motion?

12                  THE COURT: No. And can you tell me right now and we  
13 can skip that trigger, if you already know you're filing a  
14 motion you could tell me what you think it's going to be about.  
15 I don't really have authority to tell you not to file a motion,  
16 but I can certainly tell you it's not going to be well  
17 received, and you can read the tea leaves from that, if it is  
18 not going to be well received.

19                  MR. SAVAGE: Obviously we're going to file a motion.  
20 It's a two-part motion seeking to dismiss the entire case and  
21 in the alternative that the Court does not dismiss the case  
22 seeking spoliation damages on the issue of the recording.

23                  THE COURT: The spoliation issue is probably pretty  
24 simple. I assume Ms. Macias knows what she said and the  
25 appropriate sanction is at best is that her statement of what

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1 went on in that conversation can't be contradicted.

2 MR. SAVAGE: Right.

3 THE COURT: You're certainly not getting more than  
4 that, and that may be something that Ms. Sheperd doesn't  
5 oppose.

6 MR. SAVAGE: And the third, we're going to be  
7 attacking the case for failure to prove a case and failure to  
8 meet the standards for Title VII or New York State or New York  
9 City discrimination law either for failure to state a prima  
10 facie case or failure to establish any kind of pretext or any  
11 of the requirements for a claim for harassment.

12 THE COURT: What about the retaliation claim?

13 MR. SAVAGE: We're going to seek to dismiss that, too.  
14 There was no retaliation.

15 THE COURT: But is the timing such that after a  
16 complaint about discrimination her termination followed shortly  
17 thereafter?

18 MR. SAVAGE: Well, obviously timing is certainly a  
19 factor that we know courts look at, but the record will  
20 establish, we think, that the issues that had been raised about  
21 Ms. Sheperd's performance in her job were such that it  
22 overcomes any inference that may be generated by virtue of the  
23 timing issue.

24 THE COURT: I'm somewhat dubious, particularly on the  
25 retaliation claim without even hearing from Ms. Sheperd. If

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1       this case were to go to trial, how many witnesses from BCBG are  
2       there likely to be? Two?

3            MR. SAVAGE: I was thinking three or four, probably no  
4       more than that.

5            THE COURT: I mean, I know defendants never like to  
6       trust juries if they don't have to, but I suspect it would cost  
7       you less to try the case and depending on whether you consent,  
8       which is another issue we're going to deal with today, whether  
9       you all consent to have the case in front of me or Judge  
10      Sullivan, you can certainly get it tried in front of me faster  
11      than you'll get a decision on the summary judgment motion. So  
12      that's something you might want to think about.

13            MR. SAVAGE: We understand.

14            THE COURT: Okay. Well, I guess we're going to  
15      summary judgment motion route. It may not be overly  
16      successful, but it is what it is and it remains due at the  
17      moment July 9.

18            MR. SAVAGE: Thank you.

19            THE COURT: Let's go back on the 636(c) question. If  
20      both sides consent, the case can be in front of me for all  
21      purposes, meaning my decision on the summary judgment motion  
22      would be dispositive, and any jury would have the final word on  
23      a trial and direct appeal to the Second Circuit from whichever  
24      of those decides the case to the Second Circuit as it would in  
25      front of Judge Sullivan. Are you in a position to make the

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1 decision today?

2 MR. SAVAGE: I think we are, Judge. With all respect,  
3 your Honor, I think we will leave things as they are with Judge  
4 Sullivan as the district judge with responsibility for the  
5 case.

6 THE COURT: That means your vote -- doesn't mean your  
7 vote doesn't count, but whether there are two no's, or one no  
8 and one yes, under the Constitution it means it goes back to  
9 Judge Sullivan. For me it means that I make a report and  
10 recommendation on the motion and whatever I do on that is  
11 reviewable by Judge Sullivan.

12 Okay, so, now, the issue you haven't raised and  
13 perhaps because you were waiting for Ms. Sheperd to raise it  
14 and the reason I held off anything about your May 31 letter is  
15 I got on the, I don't know, fax or e-mail, but you sent e-mail  
16 to my secretary late, 11:00 p.m. or so last night, a document  
17 demand which apparently has been served on the defendants.  
18 Have you received that, Mr. Savage?

19 MR. SAVAGE: Yes. I received it about 11:30 last  
20 night and we wrote to Ms. Sheperd about it this morning.

21 THE COURT: And what did you say?

22 MR. SAVAGE: I said, and we have a copy for your Honor  
23 if the Court wants to see it, we said that the discovery cutoff  
24 of June 14 has been in place since March 1. We served  
25 discovery notices on March 2 which had 30-day notices in them

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1 so Ms. Sheperd certainly saw that. We were here about 27 days  
2 ago and on page 18 of the transcript, your Honor, was about as  
3 clear as could be that if Ms. Sheperd wanted to serve any  
4 discovery notices they had to be served by May 14 in order to  
5 provide us with the time to which we are entitled by the  
6 Federal Rules.

7 May 14 came and went. Indeed, the month of May came  
8 and went with nothing, and then we receive not only any  
9 document request but a fairly extensive document request on  
10 Sunday night, which really means Monday. It's ten days before  
11 the discovery cutoff. We didn't tell Ms. Sheperd not to serve  
12 them until now. It's our position that we are not required to  
13 and should not be required to respond to these document  
14 requests.

15 THE COURT: Ms. Sheperd?

16 MS. SHEPERD: Your Honor, the last time we were here,  
17 I don't think -- I think it was the 13th of last month.

18 THE COURT: May 8.

19 MS. SHEPERD: I was advised by the Court to redo my  
20 interrogatories and be more specific. That's what I focused  
21 on --

22 THE COURT: And you were given a date to do it by.

23 MS. SHEPERD: Correct, which was the 15th, I believe.

24 THE COURT: Correct.

25 MS. SHEPERD: So that's what I did. I completely -- I

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1 don't want to -- I didn't realize that I had to give them my  
2 document request by May 14th as well, until I read the  
3 transcript, which I received on May 25th.

4 THE COURT: You were here when I told you about the  
5 30-day requirement and that you had to get all your document  
6 requests -- all your discovery requests in 30 days in advance  
7 of the June 14th cutoff, but that I gave you the extra day or  
8 whatever to get it to May 15th because that was the same day we  
9 were making your revised 26A disclosures due. You know,  
10 ignorance, if there were something minor, just "give me my  
11 personnel file," I would say yes. But this is 48 requests  
12 cannot possibly be done in ten days. I'm not even sure it can  
13 be done in 30, and I gave you all plenty of warnings that I was  
14 not going to extend the discovery cutoff date.

15 MS. SHEPERD: Okay. So I would assume that then do I  
16 need to answer their additional requests, then? Because I  
17 should have 30 days --

18 THE COURT: Anything that is new, and that's why I  
19 wanted to consider these together, and whether it's something,  
20 you know, that you didn't think of, Mr. Savage, and couldn't  
21 possibly know or anything else, it's going to have to be  
22 relatively uniform ruling on both sides. Anything that you  
23 asked for in your prior requests and that because of whatever  
24 reason you didn't get and now you're renewing the request for  
25 that's one thing. Anything from the May 31 letter --

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1                   MR. SAVAGE: Well, the May 31 letter, your Honor, all  
2 comes out of the depositions. These are materials that we had  
3 no way of knowing until Ms. Sheperd actually testified.

4                   THE COURT: You should have taken the deposition  
5 earlier.

6                   MR. SAVAGE: We couldn't, Judge. We couldn't take it  
7 much earlier because Ms. Sheperd didn't give us her discovery  
8 responses until well after they were due. Yes, within the  
9 second deadline that your Honor gave us.

10                  THE COURT: There are two choices. That's why I was  
11 tying these together. To make my life miserable in one way and  
12 easier in another by saying we'll extend the discovery cutoff  
13 30 days or whatever it is so that both sides requests could be  
14 dealt with, or as far as I'm concerned it is what it is.

15                  MR. SAVAGE: Our view, your Honor, is that there is  
16 nothing that is new in the May 31 letter because it all expands  
17 on or comes from --

18                  THE COURT: All right, then you've got to give me a  
19 copy of your prior document requests.

20                  MR. SAVAGE: We'll submit that by fax tomorrow  
21 morning.

22                  THE COURT: I was hoping you would have it with you  
23 now.

24                  MR. SAVAGE: I don't have it with me. We can --

25                  THE COURT: You know --

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1                   MR. SAVAGE: Judge, can I have it faxed down here now  
2 if I can get to a telephone.

3                   THE COURT: It's 3:30. I have other cases this  
4 afternoon. Is there anything that's going to make or break  
5 your case here?

6                   MR. SAVAGE: If I could just take a look at the  
7 letter.

8                   THE COURT: Otherwise, I think we're just going to say  
9 you got enough, let's move on and let's get this case to motion  
10 practice.

11                  MR. SAVAGE: Well, certainly, there are a couple of  
12 things that I think were included in the request. Item 4 is  
13 all e-mails and documents which refer to your working at BCBG  
14 Max Azria alleged in the complaint to the lawsuit efforts to  
15 obtain work. Not that Ms. Sheperd may have and I understand  
16 believed this just concerned correspondence between she and  
17 BCBG personnel.

18                  THE COURT: Stop a minute. Is there any other such  
19 documents? Did you write to friends, relatives, whatever,  
20 about your work at BCBG?

21                  MS. SHEPERD: It's very possible, your Honor.

22                  THE COURT: And do you still have those e-mails?

23                  MS. SHEPERD: It's possible. I would have to -- I  
24 thought it was only correspondence with BCBG employees.

25                  THE COURT: All right, then that you've got to look

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1 for. What else?

2 MR. SAVAGE: Same thing about text messages with same  
3 requests.

4 THE COURT: Do you have the text messages?

5 MS. SHEPERD: No.

6 THE COURT: That answers that.

7 MR. SAVAGE: Complete tax returns. We got the first  
8 pages.

9 THE COURT: You're not entitled to them. I'm denying  
10 that request.

11 MR. SAVAGE: Number 6 and 7, further communications  
12 between the plaintiff and Ms. Macias, to the extent those  
13 exist.

14 THE COURT: So this would be something coming from  
15 Ms. Mecias? You guys obviously have that.

16 MR. SAVAGE: Number 10, the journal that Ms. Sheperd  
17 testified in which she kept notes relating to her employment  
18 with the company and events related to her allegations of  
19 discrimination.

20 THE COURT: And you're representing to me this was  
21 covered by your prior requests?

22 MR. SAVAGE: When we asked for all documents  
23 pertaining to any aspects of the discrimination claim.

24 MS. SHEPERD: Which I provided. Now he says he wants  
25 the entire journal.

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1                   THE COURT: So you took out of the journal the pages  
2 that were relevant?

3                   MS. SHEPERD: Exactly.

4                   THE COURT: That's sufficient.

5                   MR. SAVAGE: There were a series of typewritten notes  
6 which we marked as Exhibit LS51 and part of it was cut off. We  
7 asked the plaintiff to produce a complete and cleaner copy.

8                   MS. SHEPERD: He had the copy when he gave it to me in  
9 his exhibit.

10                  THE COURT: Apparently the copy he has has things cut  
11 off. Just check your original against the copy that was marked  
12 at the deposition. If that's the best copy there is, sobeit.  
13 If you happen to have a better copy, just make a clean Xerox of  
14 it and send it over.

15                  MR. SAVAGE: That's all we ask. And number 13, which  
16 concerns Ms. Sheperd's trip to California in May 2009 when she  
17 was a BCBG employee. We have questions about that trip and  
18 when and how it was arranged and we'd like to see proof of when  
19 the contingent were purchased, how they were purchased, things  
20 of that nature.

21                  THE COURT: This was requested previously?

22                  MS. SHEPERD: No, it was not.

23                  MR. SAVAGE: It was not, because it came up at her  
24 deposition.

25                  THE COURT: The request is denied. Okay? And if I

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1 wasn't clear, Ms. Sheperd's requests dated June 3 is denied in  
2 its entirety as being too late.

3 MR. SAVAGE: That's how we understood it, Judge.

4 THE COURT: Settlement? Any chance we can settle this  
5 case?

6 MR. SAVAGE: As we discussed before, I'm prepared to  
7 listen to a demand, and just so Ms. Sheperd is clear any  
8 settlement discussions are offered, they can't be used by  
9 either side against either one, to prove, oh, you must feel  
10 you're guilty that's why you offered me money or anything like  
11 that. So I'm prepared to listen. We really haven't received a  
12 settlement demand yet. We have the \$10 million request in the  
13 interrogatory answer. I think there's been some change in  
14 that, but a settlement demand which is not capitulation, we  
15 haven't received that, but I'm happy to talk about it with the  
16 company once I get something from Ms. Sheperd.

17 THE COURT: Ms. Sheperd, do you want to talk  
18 settlement now or not?

19 MS. SHEPERD: No.

20 THE COURT: Okay. Then we're going to motion  
21 practice. Okay, the motion is due July 9. The usual rules are  
22 two weeks for opposition, one week for reply. But if you think  
23 you need a little more time, Ms. Sheperd, even before you see  
24 their papers, I'd be willing to give you a little more time.  
25 What's your pleasure? Do you want three weeks instead of two?

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1 MS. SHEPERD: Please.

2 THE COURT: Opposition due July 30 and that would make  
3 the reply due August 6. You want another day or two?

4 MR. SAVAGE: Yes, I would. If the Court is going to  
5 extend Ms. Sheperd's time, which I'm totally fine with, then  
6 I'd like some extra time on mine. I don't know when  
7 August 6 --

8 THE COURT: The 6th is a Monday, I'll give you  
9 Wednesday, the 8th.

10 MR. SAVAGE: Fair enough. Thank you, Judge.

11 THE COURT: I remind both sides in addition to filing  
12 your papers officially on the ECF system you need to send me a  
13 paper courtesy copy.

14 MR. SAVAGE: Understood.

15 THE COURT: Okay.

16 MR. SAVAGE: Thank you, your Honor.

17 MS. SHEPERD: Your Honor, may I ask a question? You  
18 mentioned that I wasn't supposed to provide tax information.

19 THE COURT: Correct.

20 MS. SHEPERD: But I already provided the information.

21 THE COURT: Whatever you provided, you provided. I'm  
22 just not making you provide anything else.

23 MS. SHEPERD: But going forward if someone were to ask  
24 me for that I didn't have to provide it?

25 THE COURT: There are standards in the case law to

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1 when it's appropriate, when it's not appropriate. In general  
2 it depends on the allegations in the case and at a minimum  
3 you've got to provide any time you're claiming lost income  
4 sufficient either W-2's, 1099's and/or the line on the tax form  
5 that shows what your income is. The other pages of investment  
6 income or charitable donations or any of that is almost never  
7 relevant, but that's a generality.

8 All right, I'm going to direct you, Mr. Savage, to  
9 purchase the transcript.

10 MR. SAVAGE: Just like we did last time and we'll  
11 happily do it again.

12 THE COURT: Provide a copy to Ms. Sheperd as soon as  
13 you can. It may take 30 days, Ms. Sheperd, but whenever  
14 defense counsel gets it, they will send it to you. If you want  
15 it faster than that, you're free to buy it from the court  
16 reporter yourself. Otherwise you get a freebie, but I can't  
17 order him. I can, but I'm not ordering anything other than the  
18 normal 30-day delivery. If defendants want it faster for some  
19 reason then you'll get it faster, too. Otherwise normal  
20 delivery.

21 All right. And technically you need to answer the  
22 counterclaim, so consider that served on you as of today or  
23 tomorrow and I assume your answer is going to be just a denial  
24 or whatever else you want to say, but put that in writing just  
25 like they had to answer the complaint. You need to answer not

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1 the affirmative defense and other things, but just part of  
2 their amended answer that is denominated the counterclaim.

3 MS. SHEPERD: And is there a date that I have to have  
4 that to them by?

5 THE COURT: I think the rule is ten days.

6 MR. SAVAGE: That sounds right to me, Judge. Far be  
7 it from me to tell the judge --

8 THE COURT: We're closing discovery July 15th,  
9 although technically we've closed it as of now. I don't see  
10 any reason you can't get it done by June 14, so that will be  
11 your deadline. Okay, we are adjourned.

12 MR. SAVAGE: Thank you, your Honor.

13 (Adjourned)

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